No. 151.

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SUPREME COURT
UNITED STATES.

OCTOBER TERM, 1894.

No. 151.

AMBROSE P. S. STUART,

Appellant,

vs.

KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,

Appellee.

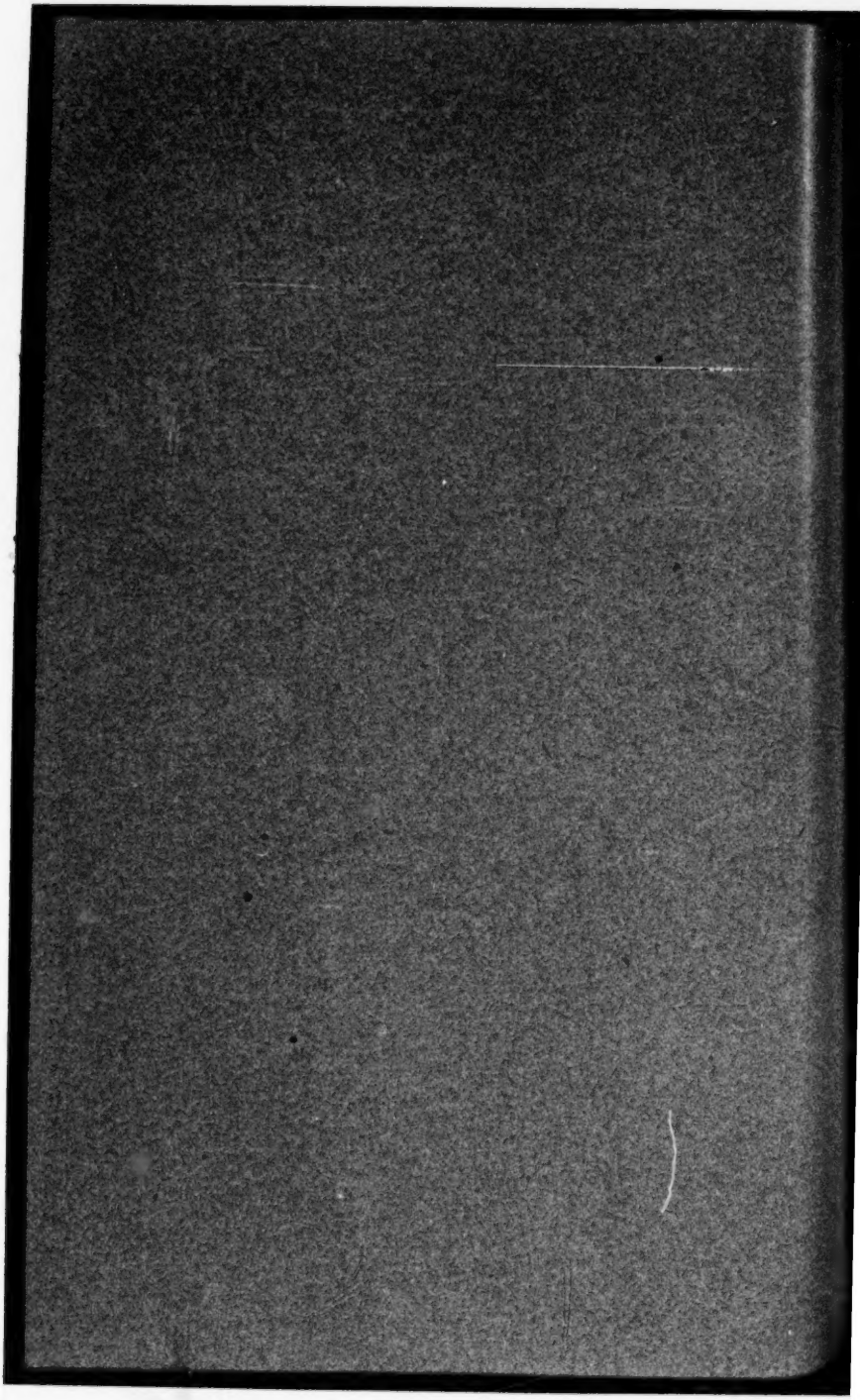
APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANT.

C. C. FLANSBURG,

Counsel for Appellant.

GEO. NORTH & CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



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C. C. FLANSBURG, *Counsel for Appellant.*
G. M. LAMBERTSON, F. M. HALL, AMASA COBB, AND A. E. HARVEY, *Counsel for Appellee.*

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

About the year 1886 the Capital National Bank organized at the city of Lincoln, Nebraska, and appellant, Ambrose P. S. Stuart, was elected a director thereof, and from that time until about the 17th day December, 1892, he con-

tinued at all times to be a director of said bank. He was, during said time, a member of the finance committee, and owned and had standing in his name on the books of said bank 150 shares of the capital stock of said bank of the par value of $100 per share.

During the time he was such director he gave but little attention to the affairs of the said bank, except to examine occasionally and in casual way, when in the bank, the "interest received" account book, which was always at hand where it might be readily inspected. As a member of the finance committee he occasionally, probably twice a year, examined the bills receivable of the bank, or such of them as were placed in his hands, for the purpose of ascertaining whether they were good and collectible bills. If any appeared to him objectionable, he at once took them to officers of the bank active in its management, the president and cashier, who explained away whatever objection was raised against them, and made them appear satisfactory to him.

On December 17, 1892, and for a long time prior thereto, Augustus T. Gruetter and Chas. F. Joers were engaged in the mercantile business in the city of Lincoln, Nebraska, under the firm name of Gruetter & Joers, and on the 17th day of December, 1892, they had a stock of merchandise aggregating in value the sum of about $32,000, and owned a business building incumbered by a mortgage of $30,000, but were at that time solvent and able to pay their debts, and were doing a prosperous business, were in a flourishing financial condition and entirely solvent.

Somewhere about the 12th of December, 1892, W. C. Crooks, a real estate broker of Lincoln, came to appellant at his home, as a representative and on behalf of said Gruetter & Joers, and undertook to pursuade the said appellant, Stuart, to purchase of the said Gruetter & Joers the building heretofore mentioned, a certain brick block on 13th street, in said city, described more particularly as lots D, E, & F, of Baldwin's subdivision of lots Nos. 5 and 6, in block No. 39, according to the original recorded plat of the town, now city of Lincoln, Nebraska, and represented to the said Stuart that it would be a very fine investment. The price asked was $67,500. Stuart, not having sufficient money to make the purchase, at once so advised said Crooks, the agent for said Gruetter & Joers, whereupon said Crooks replied that there was a $30,000 mortgage upon the premises, together with some accrued interest and taxes, and suggested that, as Stuart had $15,000 stock in the Capital National Bank, he should turn this in as so much cash on the trade. After considerable urging on the part of said Crooks, continued over a period of from one week to ten days, and insisting that it was an excellent investment and would yield a large return, appellant Stuart stated to said Crooks that he did not care to part with his stock in the bank, as he believed that, too, was a good investment, for it had paid good dividends in the past and he believed it would again; also that he had at one time been offered $1.25 on the dollar for this stock, and if Gruetter & Joers would take the stock at that price, and the mortgage, interest, and taxes upon their property were deducted, he could probably raise the balance of the price in cash, and if the title was satisfactory he would make the trade. The inducements to make this trade and

turn over the bank stock all came to appellant Stuart from Gruetter & Joers through their agent Crooks, and at a time when he, said appellant, had no thought, desire, or intention of parting with said stock. After the trade was first suggested, and before its consummation, Gruetter & Joers looked up the condition of the bank, went to the cashier and made special inquiries as to the value of the stock, and were informed by the cashier of the bank that the stock was good, that the bank was all right, and the stock was worth whatever anybody would pay for it, but that he did not think there was any for sale.

Thereupon, and after such examination, Crooks, as agent of Gruetter & Joers, advised and informed appellant Stuart that Gruetter & Joers would take the stock at $120 per share, and appellant Stuart, finally consenting and agreeing to turn said stock in on said trade at $120 per share, on December 17, 1892, gave to said Crooks a check upon the said Capital National Bank for $1,000, to bind the bargain, the trade to be consummated on the terms previously proposed if the title proved satisfactory.

Afterwards appellant Stuart, in company with said Crooks, called at the place of business of the said Gruetter & Joers and had some conversation with them, in which he gave it as his opinion that the bank was solvent. He further stated to them that the bank was hard up; that they would probably not pay any dividend in January because, as Mosher, the president of the bank, had informed him, a considerable portion of the bank's money was tied up in real estate; how much he did not at that time say, but he thought that as soon as the real estate was sold the bank

would be returning its former dividends, and if a dividend was paid on the succeeding January, appellant wanted it paid to him. There was some wrangling over the dividends, but finally appellant Stuart consented to permit Gruetter & Joers to receive same, if any were declared by the board in January following.

It is also in proof that Mosher, the president of the bank, was reputed to be very wealthy, a shrewd financier, a good manager, and a successful banker. The appellant Stuart had the utmost confidence in both Mosher, the president, and Outcalt, the cashier, and trusted them with the affairs of the bank, and believed that the bank was making money, being himself an old man and engaged in other matters that claimed his attention.

At the time of making this trade between appellant Stuart and Gruetter & Joers, the bank was in fact insolvent, although it was not known to be so by appellant Stuart, nor could he have discovered it by an examination of the books of said bank, as they were so manipulated and falsified that the bank's true condition did not appear. And on the 22d day of December, 1892, the appellees, Gruetter & Joers, together with their wives, completed the agreement and bargain of their agent, W. C. Crooks, formally agreed upon on December 17, 1892, and transferred to appellant Stuart the real estate above described, at the agreed price of $67,500, in consideration for which they received on said day the 150 shares of stock in the Capital National Bank, owned by said appellant Stuart at $120 per share, the agreed price, making a total of $18,000 as the price for said stock. They also received $19,500 in certificates of deposit and

checks, in addition to the $1,000 previously paid by a check drawn on said Capital National Bank, and $9,000 of this balance was certificates of deposit on the Capital National Bank in favor of Stuart and duly endorsed to Gruetter & Joers, and by them presented for payment, and the cash was received thereon the same day said stock was transferred to them by said appellant Stuart.

There was written in the deed transferring said property to appellant Stuart, a clause and agreement by which he assumed and agreed to pay off and discharge the mortgage of $30,000 upon said building, together with the unpaid interest and the taxes. At the time said appellant Stuart delivered the certifieates of deposit for $19,500 to said Gruetter & Joers, he had remaining on deposit, subject to check, in said Capital National Bank, about $2,500, which was still there when the bank closed its doors. But all his money in the other banks named was used by him in this transaction.

In order to induce the appellant to make this trade, it was represented by Gruetter & Joers that they were able to pay and would pay for the rental of said building the sum of $6,000 per annum, payable monthly, in installments of $500 at the beginning of each and every month; and in accordance therewith they executed a lease of said premises for a period of ten years, at said annual rental, which lease was delivered to said appellant Stuart at the same time together with the said deed, but the rent has not been paid, and was, at the trial of this case, altogether in arrears.

Upon the back of the certificates of said shares of stock

was the usual blank power of attorney, which was duly executed by the appellant, Stuart, at the time he delivered the said shares to the said appellees, Gruetter & Joers, and the said appellees, Gruetter & Joers, presented the certificates representing said 150 shares of capital stock of the said Capital National Bank to the cashier of said bank about the 2d day of January, 1893, and with the blank power of attorney upon the back duly filled, and caused the same to be entered and transferred upon the books of the said bank, and new certificates for said shares to be issued to themselves and in their name. And said 150 shares of stock were so issued to said Gruetter & Joers, and entered in and stood upon the books of said bank in their name, and said bank was then in operation, and continued so to be until about the 23d day of January, 1893, when the comptroller of the currency of the United States became and was satisfied of the insolvency of said bank, and ordered the same closed.

On or about the 6th day of February, 1893, after due examination of the affairs of said bank, one John D. Macfarland was, by the comptroller of the United States currency, duly appointed receiver of said Capital National Bank, and qualified as such receiver, and entered upon the duties of such office, and took possession of the bank, its books, records, papers, documents, and assets, and proceeded to close up the affairs of said association, and so continued until about the 4th day of May, 1893, when he resigned, and Kent K. Hayden was appointed receiver of the said Capital National Bank, and he, on or about the 31st day of May, 1893, qualified as such receiver of said bank and entered upon the duties of such office.

That on or about the 10th day of June, 1893, the comptroller of the currency of the United States at the city of Washington made and published his order of and under that date, by which he declared that the assets of said bank were insufficient to pay and meet the liabilities of the bank, and that it had become necessary to enforce the individual liability of the stockholders, and by virtue of his authority as such comptroller he did thereby make such assessment and requisition upon the shareholders of said Capital National Bank of Lincoln, Nebraska, for $300,000 (being full amount of the capital stock) to be paid on or before the 10th day of July, 1893, and upon his proclamation he made demand upon each and every one of them for the sum of $100 upon each and every share of the capital stock of said association held or owned by them, and authorized Kent K. Hayden, receiver, by all necessary proceedings, by suit or otherwise, to enforce to that extent the individual liabilities of all said shareholders.

That afterwards, on the 11th day of August, 1893, the said Kent K. Hayden, receiver of the said Capital National Bank, filed his bill in equity, in the Circuit Court of the United States for the district of Nebraska, reciting and alleging the organization of the bank, the appointment of himself as receiver, the order of the comptroller of the United States to the appellant, Ambrose P. S. Stuart, and alleging that the transfer of the said 150 shares of the capital stock of the said Capital National Bank upon the books of said association, made on the 3d day of January, 1893, were in fact fraudulent, were colorable only, were made with full knowledge on the part of the appellant Stuart that

the bank was insolvent; that he, personally, as well as officially, knew of the insolvency of said bank, and in order to escape his liability transferred the said stock to Gruetter & Joers, an insolvent firm, who were pecuniarily irresponsible and unable to respond in damages; and on the 21st day of February, 1894, filed an amended bill against Ambrose P. S. Stuart, Augustus T. Gruetter and Charles F. Joers, partners as Gruetter & Joers, setting up substantially the same facts as in his original bill, setting up that the transfer to Gruetter & Joers was made in bad faith, in anticipation of the early insolvency of the bank, and to escape the liability of the said appellant, Stuart, as the holder and owner of 150 shares of the capital stock of the said association, charging and alleging the insolvency of Gruetter & Joers, the transferee, the parties in whose names the said stock stood on the books of the said association, asking that the said transfer be declared to be fraudulent and void as to the receiver and creditors of the bank, that the same should be set aside and held for naught, that the court order and decree the legal title to said bank shares to be in appellant, Ambrose P. S. Stuart, that he be required, compelled, and decreed by the court to pay the full assessment of one hundred cents on the dollar on each share of the said stock so decreed by the court to belong to him, and that the co-respondents, Gruetter & Joers, be decreed and declared by the court to have no interest therein.

The appellant, Ambrose P. S. Stuart, in due course, filed his answer to the said bill, in which he set up substantially the facts as hereinbefore stated, the consideration for said transfer, that the same was made in good faith, that he did

not know of the insolvency of the said bank, that he did not know of the insolvency of the said Gruetter & Joers, that in truth and fact they were not insolvent, that the receiver had made no attempt or effort to recover the amount of said assessment from Gruetter & Joers, that the said Gruetter & Joers were claiming and insisting by legal proceedings then pending that the transfer was in good faith and that it was for full value; asking that the said bill be dismissed as to appellant, and that the said Gruetter & Joers be compelled to pay the said assessment.

Gruetter & Joers, in due course, on or about the 20th day of March, 1894, filed a pleading termed a cross bill, in which they alleged substantially the facts hereinbefore set forth, reciting that the said Ambrose P. S. Stuart knew of the insolvency of said bank, and fraudulently, and for the purpose of cheating, defrauding, and deceiving them, misrepresented and warranted the stock to be of the value of $120 a share; that he knew at said time it was not of that value, or of any value, and that it was worthless, and that he did it with the intent to cheat and deceive the said Gruetter & Joers. There is also an allegation that the said Gruetter & Joers called upon the bank officials, and were advised by them that the said stock was good; that they relied upon said statement by said cashier, and the fraudulent representations of value made to them by the appellant, Stuart, and were induced thereby to trade for the said stock; that they also relied upon the published statements of the bank, made and signed by the directors, of the condition of the bank (none of which were signed by appellant Stuart) and so relying upon the published statements of the bank, and the

statements of the cashier and of appellant Stuart, that the stock was of the value of $125 per share, and that the bank was in a solvent and prosperous condition, were induced to make the trade. They prayed that the petition of the receiver be granted; that the shares of stock standing in the name of Gruetter & Joers upon the books of said bank be decreed to be the property of, and the legal title thereto to be in, appellant Stuart; that he be required and compelled to pay the sum of $15,000, the amount of the assessment thereon, directed and assessed by the comptroller, upon all owners of stock, and that he make a full restitution of the $18,000, the price at which said stock had been taken and received by the said Gruetter & Joers in the said trade as a part of the consideration of said building. There was no tender or offer to return the $19,500 in cash, nor to return the bank stock, nor was there any attempt to procure from the said Stuart, appellant, a deed to the property, to them, nor did they attempt in any way to place the said appellant in *statu quo*. But their action merely was one to escape the personal liability by reason of the ownership of said stock, and to recover the amount of damages which they had sustained.

It appears on the face of the cross bill that Gruetter & Joers are both residents of the city of Lincoln in the state of Nebraska, and their co-respondent, Ambrose P. S. Stuart, is also a resident of the city of Lincoln and state of Nebraska.

Appellant Stuart interposed a demurrer to the jurisdiction of the court on this cross-action, which was overruled.

Subsequently thereto an answer was filed by the said Stuart, alleging and pleading that the trade was made in good faith, for a full consideration; that he had made no warranties whatever; that he had merely expressed an opinion as to the value of the stock; that he, in fact, did not know the condition of the bank, but supposed it to be solvent; that they had never tendered back to him, nor offered to repay him, what he had paid to them in the transaction, and also alleging and pleading the beginning of a suit in attachment and for damages, by the said Gruetter & Joers, in the district court of Lancaster county, Nebraska, for deceit in said exchange, which was then pending and undetermined, and alleging that, by said suit, said Gruetter & Joers had affirmed the validity of the contract, and that they could not now come into equity and ask to rescind or have restitution.

Replication was filed to both the answer of Stuart to the bill and cross bill, and trial was had, resulting in a decree granting the prayer of complainants' bill. It has not been shown in the testimony, nor was it claimed, that Stuart, appellant, had any actual knowledge of the insolvency of the bank, but knowledge was imputed to him by reason of his official position in connection with the said bank.

The decree found that Stuart was a director, and that he knew the bank was insolvent. There was no finding as to whether Gruetter & Joers were solvent or insolvent. There was a finding that appellant had transferred the stock with a fraudulent intention to cheat and defraud the creditors of said bank, and the decree and finding that the said Stuart was the owner of the said 150 shares of stock,

and ordering that he, as the legal owner, pay into court the sum of $15,000, as assessed by the comptroller against all holders and owners of stock, together with 7 per cent interest from the time the assessment was made, and granting to Gruetter & Joers $18,000 damages, together with 7 per cent interest from the 23d day of January, 1893, the date when said sale was consummated and said bank stock turned over. From this finding and decree the appellant prosecuted appeal to the United States Circuit Court of Appeals for the Eighth Circuit. On the hearing in that court the decree below was reversed but without costs, and the court below instructed to enter a decree to the effect that the transfer of said shares was fraudulent and voidable as to receiver Hayden, appellee, and ordering a recovery against him on said assessment and costs thereof, that Gruetter & Joers were entitled to no relief under their supposed cross bill, and that the same be dismissed, and awarding Stuart, appellant, costs against them. From that finding and decree this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

First—The court erred in holding the said appellant Stuart liable simply because he was a director and ought to have known, when, in fact, he had no actual notice of the condition of said bank.

Second—The court erred in rendering judgment for the receiver, and holding the appellant Stuart liable on said assessment levied by the comptroller.

Third—The court erred in holding that said transfer was

fraudulent, and made on behalf of said Stuart with the intent and for the purpose of escaping his statutory liability.

Fourth—The court erred in holding that the said transfer was voidable as to the bank after it had found that the transferees were solvent at the time of the transfer.

Fifth—The court erred in reversing the case and ordering a decree to be entered against Ambrose P. S. Stuart, thus and thereby making a new contract for the parties.

Sixth—The court erred in holding that said transfer was voidable as to the bank, after it had expressly found that the transfer was valid as to the transferees, and that they had, by affirmative action, confirmed the validity of said transfer.

Seventh—The court erred in not directing the receiver to collect from Gruetter & Joers, the transferees, the amount of the assessment, it appearing that they were, at the time of the bringing of the suit, possessed of large amounts of personal property, more than sufficient to pay the assessment levied by the comptroller; and it also appearing that Gruetter & Joers, the transferees, with full knowledge of all the facts, had confirmed the validity of the transfer.

Eighth—The court erred in not awarding to the appellant, Stuart, his costs in reversing the decree of the court below, the circuit court having held that the transfer was void as to the bank, having ordered a transfer of the shares of the stock to be entered upon the books of the bank in the name of Ambrose P. S. Stuart, when, in fact, at the most, said transfer was only voidable, and the court had no jurisdic-

tion to award the entering of said transfer upon the books of the bank; and this decree being erroneous, and so found by the circuit court upon a reversal thereof, appellant should recover his costs.

ARGUMENT.

I.

When a director of a national bank has in fact no knowledge of its insolvency, will the law impute to him such knowledge in order to render fraudulent and void a transfer of his stock made upon full consideration to a third party, solvent at the time of such transfer?

This question covered by the first assignment of error made by appellant is answered by the court below in the affirmative, and is one of the grounds of complaint upon which reversal of this case is sought.

It was claimed by appellee that the transfer of his stock by appellant Stuart was void as to the bank, the creditors of the bank, and himself as their representative, as such transfer was made with the fraudulent intent and purpose on the part of appellant Stuart of escaping his statutory liability to respond to an assessment, and that whether ap pellant Stuart had actual notice of its insolvent condition or not was immaterial, because of the fact that he was a director, and chargeable with everything that the books of the bank would have disclosed; and that, inasmuch as the bank was in fact insolvent, he could not transfer his stock to any person without remaining liable to answer to an assessment on the transferred stock.

The greater portion of the testimony taken simply shows the condition of the bank at or about the time of its suspension, but does not in anywise tend to prove knowledge on the part of appellant Stuart as to its condition. The receiver, appellee, testifies that the bank was in a bad condition; insolvent for a very long period of time, so far as the books of the bank show; but in order to discover their true condition it would have been necessary to *go through all the books of the bank* (record, 128); and among other things he takes up the certificate of deposit account and attempts to prove that this ought to have been notice to the directors and every person of the exact condition of the bank, and says (record, 128, 129) that the books did not show the *true* condition, and there were more certificates outstanding than the books disclosed, and that the bank kept a certificate register, stubs of all certificates, and a certificate account, but this latter did not show the *true* condition; that one method of issuing certificates was to make the stub for a small amount, the certificate for a large amount, and to make the register agree with the stub itself in amount. In some cases the stubs and records would not agree, and the certificate register would be marked in many instances "paid," but that, as a usual thing, the certificate of deposit register tallied with, so far as the amount was concerned, the stub of the certificate, and that there was no way of detecting the *actual* amount of the certificate *until it was returned or presented for payment;* that they kept a certificate of deposit account in the ledger, but he *does not know* from what place the entries in that account were taken to form the debits and credits, and that the books themselves *would not have disclosed* the true condition

of the certificate of deposit account (record, 130), and that the discrepancy between this account, *as shown by the books*, and the *actual* certificates which were returned and those outstanding was $356,649.49, which have been allowed against the bank by the receiver, and in addition one for $150,000 (which had not been allowed) making a total of $506,649.49 not shown by, and in excess of, the book account (record, 130); that he does not know, and has no idea of, the amount of excess certificates of deposit *actually* issued, because he does not know that *all* the stubs *could be found*, and if they were he would have to find all *returned* and *paid* certificates, deduct the paid certificates from the total, as shown by the stubs, and even *then* it would *not show the true state* of the account, as the certificate register was balanced by the word "paid" being put opposite certificates which really were *not* paid, thus reducing the apparent number of certificates outstanding in quite an amount.

Again, in regard to detecting the discrepancies in the other accounts, this witness says it would have taken someone familiar with the banking business to know *where* to go to detect the discrepancy (record, 131).

Taking up the item $46,000 of stock and bonds as assets, he testifies that the bank owned none at that time. In answer to question by counsel as to how he could tell from Mosher's bookkeeping whether they had any or not, he replied:

"Because he eliminated the account by a false entry; it is possible that they *may* have had the stocks and bonds,

but if they did Mosher appropriated them to his own use" (record, 131–132).

Again, as to manipulating the interest paid account (record, 133), he shows that this is an account that never could have a credit under any condition, and so he says an examination of this would have shown the *false credits* before spoken of, and an examination of the bills receivable would have shown bad debt.

But does the law require a search for credits where none could appear? And this is the sole testimony upon which they charge appellant with knowledge, the records upon which they impute to him notice, records so manipulated, falsified, and changed that even the expert accountant in charge, who at the time of taking his testimony had been in possession of these books for eighteen months, a banker by profession and training for twenty-three years (record, 120), himself confesses that he cannot tell from the careful, critical examination that he has given to these accounts, what became of the $46,000 of bonds—whether they were really *appropriated* or whether the *entry was a false one.* And so with the certificate of deposit and other accounts. The whole thing, he said, "was manipulated by Mosher" (record, 130).

On the other hand is the testimony of appellant Stuart, who says:

"I never saw or examined the interest paid account, never saw the book until the bank failed. The interest received book was lying right in sight, and that was the reason I looked at that" (record, 49).

And again (record, 49) he says that he never examined the books at all, at any time, and that the only book he ever looked into besides the interest received account was the ledger occasionally to see what his balance was. He says he trusted the affairs of the bank to the managing officers, and relied on their fidelity; that he was not a bookkeeper and could not have told anything about the books by an examination (record, 38). If the testimony of the receiver is true, the books themselves, even if examined by him, would not have given him any knowledge of the truth.

He says again (record, 45):

"I had confidence in the managers of the bank. I supposed they would not declare a dividend unless there were proceeds enough to justify declaring a dividend,"

And that he never examined to see whether there was any manipulation of those books at all, as he did not think there was any occasion for it. He had the utmost confidence in the parties managing the bank. He says (record, 60):

"I had, to sum it all up in a word, the utmost confidence in Mosher and Outcalt. I thought he was as straight as a string in his business transactions. There was nothing to excite my suspicions at all."

To further show this confidence, it is his testimony that, the time of the transaction with Gruetter & Joers, he drew out all the money he had in the Industrial Savings Bank, that he sold his stock in the Union Savings Bank to raise money (record, 81, 82), with both of which institutions he was connected, to be used in that transaction, and drew

the balance necessary out of the Capital National Bank, and left $2,500 remaining, and (record, 82) it was in there "when the bank failed" (record, 60).

Again, in reply to counsel on cross-examination as to his being uneasy, he says (record, 62):

"No; you say uneasy; I was not uneasy. I had the utmost confidence, I have said again and again, in the management of the bank—in Mosher—and I thought that when Mosher's name was put on the back of a note it was gilt edge; it could not be any better."

Speaking of the $2,500 left in the Capital National, and his confidence, he says (record, 82):

"There was not any of it drawn out—more put in—that is to say, I tried to make a deposit the very Saturday that the bank closed (it did not open Monday) but I did not get to the bank quite soon enough to get the deposit in."

Now if these things are true as testified to by receiver Hayden, appellee, that there was more than $500,000 of excessive certificates of deposit not shown by the books, how could a director be expected to know this fact, when the receiver himself says he could not tell until they were all in, and his own evidence shows that those certificates were outstanding, and are still, $350,000 of them and a little more having been allowed by him, and the other $150,000 not having been allowed.

Again, the $500,000 in certificates of deposit (record, 128–129), together with the $108,000 borrowed by Mosher and Outcalt after appellant Stuart sold out and the stock was transferred, would have been alone sufficient to wreck the

bank, and render it insolvent, being more than double the capital stock of the bank, and that, too, without in any possible way conveying notice to the most diligent director.

As to the bad paper which was in the bank, appellant Stuart (record, 40) testifies that the business of making the loans was left to the managing officers (the cashier and president); that if he, as one of the finance committee, found any paper that he did not think good, when examining the bank securities, he called the attention of the president and cashier to it, and that they always gave him a sufficient explanation to overcome the objections (record, 40); and, with these satisfactory explanations (record, 83), nothing further was done, but the paper was passed. As to the really bad paper, to which appellee, the receiver, testifies, appellant Stuart says that *he never saw any of that paper at any time during the period that he was a director or a member of the finance committee*, as they kept that out of the way (record, 50–82). He never had the definite amount of the aggregate bills receivable, and (record, 43–52) he never knew of any bad debts, but supposed that certain loans (called to his attention by council) were all right, as he had been so informed (record, 83); that he never suspected it until after the bank failed. He never did run over the bills receivable to add them up, and never demanded a list to be made out, but he simply passed upon the paper that was presented to him.

This, it seems to me, will show that there was no *actual* knowledge on the part of appellant, nor were the books in such condition that he ought to be chargeable with notice of their contents. They must bring home to him actual notice or participation in the fraud.

In the case at bar an attempt was made to show that appellant Stuart had reason to believe that the capital of the bank was not intact, and that he had so stated; but, so far as appears, he had no reason to suspect this and did not so state. What he did say was (record, 35) that a portion of it was locked up in real estate (so Mosher, the president, informed him), and for this reason no dividends would be paid probably until it was sold, and that then the stock would be a good, paying property again. He had no reason to suspect that any officer of the bank had practiced, or was practicing, any fraud upon the bank or the public. He was not a managing officer, simply a director, and being such, and having no actual knowledge, the real condition of the bank could not be imputed to him.

It is the contention of the appellant that he is not liable merely because he might have acquired, when in fact he had no actual knowledge of the bank's condition. The decree below can only be justified upon the ground of knowledge, and this must be clearly and conclusively established. It cannot be based upon imputed knowledge, which, in fact, appellant did not possess.

Experience has shown that no judicial tribunal can safely assume the existance of fraud, and the law never presumes it. Nor will the law impute a dishonest or fraudulent motive to a person in any given transaction if his conduct is consistent with honesty and fair dealing. Neither will a court impute to or charge a person with knowledge of facts which, if actually known by him, would have made his conduct fraudulent, but the absence of which knowledge leaves him to act in good faith, simply because

of the fact that from his position he might, upon inquiry, have learned, but does not in fact know to exist; and then, from the knowledge so imputed, declare his conduct to be fraudulent and dishonest. In other words, the law does not necessarily imply or impute actual knowledge as the basis of fraudulent conduct to one who did not, in fact, know, simply because he had at hand the means that would, if then employed, have given him that knowledge.

Fraud is intentional; its perpetration is secret; its execution simply the culmination of an unlawful or dishonest design and contrivance. Intent alone does not constitute fraud. It is the intent executed in the act that makes it. Now to say that a man ought to have knowledge of a thing, and then that, as he ought to have known it, the law will presume he did, then that, inasmuch as the law presumes him to have had knowledge, he must be held in fact to have it, hence he has in fact the knowledge which he ought to have had, and, consequently, any act must be with such knowledge, hence fraudulent, would, it seems to me, be simply a new method of presuming the existence of fraud based upon imputed knowledge.

The question, then, may be narrowed down to this inquiry: Should the appellant, because he was a director, have examined the discount register, the certificate of deposit register, and the books of the bank? Was it his duty to know their contents and condition, and is there any penalty for not doing this?

The rule laid down by this court does not require a director to make any such examination, unless he becomes

acquainted with some fact calculated to arouse suspicion, even in a case where a direct suit is brought against him as director, for the failure to perform and discharge his duty.

In the case of *Briggs vs. Spaulding*, 141 U. S., 132, the liability of directors, says this court, "depends upon whether they should have made an examination of the books and assets of the bank," and then holds that they were not required to do this, quoting with approval from the *Hallmarks* case, 9 Ch. Div., 332, the language of Sir George Jessel, as follows:

"I know no case, except *ex parte* Brown, 19 Beav., 97, which shows that it is the duty of a director to look at the entries in any of the books, and it would be extending the doctrine of constructive notice far beyond that of any other case to impute to this director the knowledge which it is sought to impute to him in this case."

In the case of *Cowley vs. Smyth*, 46 N. J. Law, 380, in a direct suit against a director, the court held that where the plaintiff came to him suggesting that there was a rumor circulating affecting the condition of the bank, and expressed a desire to withdraw his money, and the defendant thereupon replied that he was a director of the bank, on the finance committee, and it could not be possible that the bank was in an unsound condition, that he knew it was solvent, that they had a surplus of $6,000 after the dividends were paid, the court refused to impute knowledge, but held that it was a question of fact for the jury, to say whether the defendant made the representations for the fraudulent purpose to deceive, or whether he made them believing they were true. In other words, it was a question of fact to be determined by the jury.

In the case of *Swentzel vs. Penn. Bank*, 147 Pa. St., 140, the facts were that the president, with the knowledge of the cashier, and co-operation of some of the clerks, had withdrawn the funds, emptied its vaults, and squandered its assets in gigantic oil speculations. The question was whether the directors "ought to have known of these transactions," and whether their failure to know what the real plunderer was doing was such negligence on their part as to render them liable to the creditors of the bank. And this is the statement made by Mr. Justice Paxon, in writing the opinion of the court, answering that question:

"It is not alleged—it has never been alleged—that the hands of these directors are stained by fraud. The bank was wrecked by its president, with its cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The report of the bank's condition, made by the president to the directors from time to time, showed it to be in good condition, while in point of fact it was honey-combed with fraud, and its assets squandered in wild speculation. Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier, and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high; they were trusted agents of the corporation, paid for their services, and regarded in the community in which they lived as honest men. Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it."

In *Wakeman vs. Dalley*, 51 N. Y., 32, it is said:

"As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad or banking or insurance company is one of constant peril. The affairs of such a company are generally of a necessity entrusted to its managing officers. The directors generally cannot know, and have not the abilty or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. And if the directors, when actually cognizant of no fraud, are to be made liable in an action for fraud, for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should."

To the same effect see,

Arthur vs. Griswold, 55 N. Y., 400–406.
Morgan vs. Skiddy, 62 N. Y., 519–522.
Scott vs. Depeyster, 1st Ed. Ch., 541.

These authorities clearly measure the liability of a director, and appellant contends that in no event, under them, would he be liable to the receiver, or any other person, because he was a director, as knowledge of the bank's condition would not be imputed to him by reason of the position which he held.

II.

If the court shall hold that the law *will* impute knowledge whether appellant in fact knew, or if from the evidence the court shall find there was *actual knowledge*, yet this is insufficient to warrant affirmance of the judgment below.

Three facts appellant contends must exist and be established by the evidence, before there can be any liability on his part to respond to an assessment upon the shares of the stock. First, knowledge on his part of the insolvent condition of the bank; second, a consequent intent on his part to escape the statutory liability; third, the financial irresponsibility of the transferee, and inability on his part to respond to the assessment. Without these three concurring facts there is no liability on the part of the appellant. If there was in fact no knowledge on the part of appellant and the transfer was for full consideration, there is no liability. If there was no knowledge, then there could have been no intent to escape the liability. If the transferee was solvent and able to respond at the moment of the transfer, had an assessment then been made, the *knowledge* of appellant and the *intent* with which he transferred are alike immaterial. It is upon the ground, and the sole ground, of the fraudulent intent and purpose of appellant that the decree and finding of the court below must be sustained.

This brings us to a consideration of the second, third, and fourth assignments of error, which for convenience may be considered together, and which complain of the action of the court in rendering Stuart liable on the assessment, in holding that the stock transfer was fraudulent and made by

Stuart with the intent to escape the statutory liability, and that the same was voidable as to the bank, although the transferees were solvent at the time of the transfer.

Neither the bank nor its representative, the receiver, can select its debtor. If the transferee of stock was solvent and able to respond to an assessment made at the moment of the transfer, the transferrer is dischared, whatever may have been his purpose in making it.

This, then, is the record upon which the court below based its decree. A national bank organized in 1885, with a paid up capital of $300,000; appellant, seventy-five ye ars of age, a retired professor of chemistry, owning $15,000 of its stock, and serving as a director from its organization; no experience whatever in banking, and no knowledge of bookkeeping; unable to examine the affairs and books of the bank himself; the president and cashier respected and honored by the community, of unquestioned integrity, reputed wealthy, and that wealth increasing; rumors reaching appellant as to some losses incurred, but assurances by these managing officers that real estate security ample to satisfy the bank's claims was held by it; a semi-annual dividend duly and regularly declared during the existence of the bank; a statement of the president to appellant that because of the real estate taken by the bank on debt, the semi-annual dividend of January, 1893, might not be paid; a business firm of large experience and extensive trade seeking to purchase appellant's stock in the bank, soliciting him to exchange it for a building owned by them, offering 20 per cent premium for the stock, agreeing to rent the build-

ing at an annual rental of $6,000 for a period of ten years, and finally transferring the building to appellant at an expressed consideration of $67,500, subject to a $30,000 mortgage, which appellant assumed and agreed to pay; the bank stock received at $120 on the share, and the balance $19,500 in cash paid to transferees at the time of the delivery of the stock; $10,300 of this cash drawn from the bank, leaving on deposit $2,500 more, and an attempt to make a further deposit the very day the bank closed its doors; the balance of the cash used in the transaction drawn from other intistutions, and being all appellant's cash therein; this exchange and transfer about thirty days before the bank closed; $19,500 in *cash* put into *real estate and title taken to appellant;* the day the bank closed its doors suit brought by the transferees against appellant to recover damages on account of the worthlessness of the stock, thus affirming the validity of the transfer and sale of the shares of stock to transferees; an assessment made by the comptroller of 100 per cent on the stock of the bank five months after the bank failed; no attempt to enforce the statutory liability against the transferees, who held the legal title as shown by the books of the bank.

In order to determine the validity of the transfer and consequent title, we must look to (*a*) the circumstances of the transaction; (*b*) the apparent purpose of the parties in making it; (*c*) the financial responsibility of the transferees.

A.

SURROUNDING CIRCUMSTANCES.

How was the transfer made?

Crooks testifies (record, 84):

"I had this block for sale; knew that Professor Stuart had some idle money; went to see him to sell block. He said he didn't have money enough at first conversation; talked about the amount of money and price of block. First asked $70,000. Agreed finally on $67,500 later on. Don't know whether first or second time I called asked him if he couldn't put something else in if he didn't have enough money. I mentioned the bank stock. He said he didn't care to put that in, thought it was good property. He wanted one and a quarter for it. I went away and saw Gruetter & Joers. They decided to take the bank stock if they could get it for what it was worth. We figured back and forth for one or two days; finally decided to take it at $120 (record, 85). Appellent then paid $1,000 down, which I gave to Gruetter & Joers, and they signed contract, and papers were delivered. I represented Gruetter & Joers, and authorized by them."

A. T. Gruetter, one of the transferees, says (record, 143):

"Made trade December 17, 1892. Deed turned over a week later; sold building $67,500 subject to mortgage $30,000, assumed by appellent; received $19,500 cash, and $15,000 bank stock, taken at $18,000 (record, 143). Book value of First National Bank stock was about $1.40, and Capital National Bank was about $1.10; knew First National stock sold at $1.60, and Capital National being valued at $1.10, thought $1.20 would be a fair value; executed a lease to him for ten years, annual rental of $6,000 (record, 144). If there was any dividend in January appellant wanted it. We did not agree to that. We had quite a conversation about it, and claimed if we paid $1.20 for the stock, we should have the dividends. We paid agent's commission (record, 145)" (record 148, cross examinations). Crooks first suggested the idea of making a trade of that building to Professor Stuart several weeks before December 17. We had been having a talk several times, and I made in-

quiry in regard to the stock before the 17th day of December and as to the condition of the bank."

Stuart says (record, 31):

"Crooks called and wanted me to buy the block. I answered I could not, that I was not prepared; didn't have enough money, and supposed that would end the matter, but he seemed to think I could buy it, and said what it could be had for, $67,500, with $30,000 mortgage. I said I didn't have that amount of money, and didn't see how I could make the trade. Finally the bank stock was suggested, and I said if they chose to take it,—I wasn't particular about selling—but if they did, I could (record, 32) raise enough cash, by assuming the mortgage, to take the block. Crooks came from six to ten times, and it was talked over (record, 33). I told them I had been offered twenty-five cents premium, but had concluded at the time Crooks offered not to sell, because it yielded me more than I thought I could get for money elsewhere. Part of consideration was they were to lease building for ten years, $6,000 a year. They were successful merchants, thought them solvent. They received $19,500 cash, and had a large furniture stock (record, 34); it was as honest a trade as I ever made.

The other transferee, Joers, simply corroborated the other witness, and this is the trade alleged to be in bad faith and fraudulent as to the bank.

Here, then, are the circumstances.

The trade was sought by transferees, and their agent first suggested taking the bank stock. The stock was taken, after investigation by transferees, at twenty per cent premium. The payment by appellant of $19,500 cash at delivery of the stock; the building leased for ten years at $6,000 a year to induce appellant to trade; the January dividend claimed

by both parties; the stock surrendered to transferees, and new certificates issued by the bank to them, and recorded in bank books. The money, $19,500 used by appellant was made up of all the money held by appellant in other banks, and only the balance necessary checked out of the Capital National; the $2,500 balance left on deposit with Capital National Bank, and was still there when the bank closed its doors.

The mere statement of these facts ought to show the good faith of this transaction, without any argument to support it. But appellee contends that because the bank had been plundered and was then insolvent, appellant could not act in good faith in transferring his stock. It is true that the bank president was dishonest and the bank honeycombed with his frauds; that while reputed a man of large wealth and financial power, his means were in fact limited and disappearing in private speculations. All his dishonest practices and fraudulent schemes, however, were covered and concealed by his method of manipulating books, by his suppression of truth and suggestion of falsehoods.

Only after its doors were closed and expert investigation had turned its light upon it, did the mutilated and plundered corporation appear in its reality. But while such was the fact, it would be manifestly unfair to judge appellant or his intent and motive in the light of what is *now* known of the president's character, and his methods and conduct of the bank's affairs. It is true appellant trusted him, but at that time nothing had ever occurred to shake that trust and confidence, to arouse suspicion, or put appellant upon inquiry.

B.

MOTIVE AND INTENTION.

Certain it is that every circumstance indicates good faith. Here was appellant with over $20,000 in cash, more than half of it in this bank. Appellee's theory is that appellant was trying to get away from the liability of responding to an assessment which he had reason to apprehend would be made, and this was a contrivance to cheat the bank. Would any man take $20,000 in cash which he might easily shuffle out of sight at any moment, and exchange it for real estate, taking the title thereto in his own name, if such was his motive and purpose? Would he have asked a large premium on his stock and insisted on the January dividend if there was on his part such great anxiety to be rid of it? Did appellant believe the transferrees insolvent when he had just paid them $19,500 cash, and entered into a written lease of the building with them by which they promised to pay him $6,000 a year rental for a period of ten years? Would any person, to escape a $15,000 liability, pay over $19,500 in cash, and with the apprehension of bank failure leave $2,500 on deposit in that bank until it closed its doors? These questions answer themselves, and show conclusively the lack of any sinister or fraudulent motive on the part of appellant to escape his liability. On the other hand Gruetter & Joers solicited, urged, and consummated the trade. They wanted cash for the building. They took part cash, part bank stock. In order to make the trade they executed a lease for ten years at $6,000 a year. Is this an evidence of fraud on the part of appellant? There can, it seems to me, be no doubt of the good faith of

this entire transaction, and by it the legal title to the stock passed to Gruetter & Joers, and thereby they succeeded to all "rights and liabilities" of the former owner. Their liability to respond to an assessment was complete the moment they took the title. And their liability being fixed, the only question is one of their financial ability to respond. If at the moment of the transfer they were able to meet an assessment, then not only their subsequent insolvency, but the intent and purpose with which the stock was taken are alike immaterial, and the transferrer is absolved from liability to the bank or its receiver, whatever his purpose in making it, and his intent only becomes material when the transfer is to one wholly irresponsible, or where it is merely colorable, or not an "out and out" transfer.

Not only do the facts surrounding the transfer show a *bona fide* sale to Gruetter & Joers, but their action for damages because of deceit in representing its value was a direct affirmance of the title to the stock in themselves, and confirmed the validity of the transfer. They might have rescinded and escaped liability. They, however, elected to retain the stock, and recover damages.

C.

FINANCIAL RESPONSIBILITY OF TRANSFEREES.

Were the transferees able to respond to an assessment? The court below found that transferees were solvent at the time of the transfer, but were rendered insolvent by it, or by the subsequent assessment, which the court found they were unable to pay. The record discloses their condition. Gruetter says (record, 150):

"Solvent before trade and could have paid debts; received $19,500 cash; bought stock at $18,000; our liability $15,000; appellant assumed $30,000; had $30,000 or $40,000 more liabilities besides the mortgage (record, 150); merchandise a little over $30,000; $32,000 in merchandise afterwards paid into the corporation; corporation got benefit of the $19,500; on December 17, 1892, transferees solvent if not disturbed and (record, 152) if not liable for this $15,000 assessment, then could pay out, but if called on to pay it, busted right away."

Following is a statement of Gruetter & Joers' financial condition at the time of the transfer (record, 154):

ASSETS.

Building	$67,500	
Stock of furniture	32,000	
		$99,500
Appellant rec'd bld'g	67,500	
Reducing assets to		$32,000
Appellant pays cash	19,500	
Increasing assets to		$51,500

LIABILITIES.

To First National Bank	$20,000	
To Crooks, agent	1,000	
To merchants	15,000	
To Louie Meyer	7,500	
To security debt	5,000	
To mortgage on building	30,000	
		$78,500
Appellant assumed mortg.	30,000	
Reducing liabilities to		$48,500

So that, aside from the bank stock, the firm was then solvent, its assets being $3,000 more than its liabilities, besides notes and books of account referred to but the amount not shown. What, then, is the result of this trade upon the solvency of the firm?

Appellee contends that the title to the stock was by the transfer placed in Gruetter & Joers, and that by the said transfer the transferees were rendered insolvent because of the assessment laid on said stock consequent upon such ownership, and because of the liability of transferees to respond to the call of the comptroller for an assessment.

Appellant contends that actionable fraud in behalf of the receiver only exists when he is unable to compel payment from the transferee; that fraud against the bank can only be predicated upon knowledge on the part of appellant of the bank's financial weakness and insolvency, or in information possessed by him, showing there was good ground of apprehending the failure of the bank, and a consequent stock assessment impending in the near future; and that the transfer of stock was made with the intent, first, of relieving the transferrer of the liability, and, second, of cheating the bank by the substitution of an irresponsible party as a stockholder, unable to respond to and meet the liability. It is the knowledge of the bank's condition, or the information upon which he grounds his apprehension, that shows his fraudulent intent and purpose. If there is in fact no such knowledge or information, then there is no such intent, because one cannot intend to escape a liability of which he does not know and has no reason to apprehend; and an intent to escape the liability, even with such knowledge, in-

formation, or apprehension of stock assessment is not sufficient to constitute fraud against the bank, unless the stockholder combines and colludes with some irresponsible transferee for the purpose of substituting such transferee in his stead. If the transferee could respond, or if the claim could be made out of him, then there is no fraud on the bank, as the assessment laid on the stock could be enforced.

On December 22, 1892, this stock was transferred to Gruetter & Joers, and on January 23, 1893, the bank closed and transferees began a suit at law upon said day against appellant, alleging that the stock was worthless and known to be so by appellant when transferred, that his representations of its value were false, and actually known by him to be so, and made by him for the purpose of cheating them; that because of such fraud and misrepresentations as to the value of said stock, they were entitled to $18,000 damages.

If the representations and conduct of appellant are as alleged and constitute a fraud, it was a fraud upon the transferees, and was available as such as a basis for relief in an action at law by them seeking damages. If the transfer of stock to them rendered them unable to pay the assessment, the liability of appellant to them for fraud (if any existed as alleged) would furnish the means of full payment to the receiver. If the transferees succeed in their action for damages, it at once rendered them able to respond and liquidate the assessment. It would then be the duty of the receiver, and he must recover the assessment from them. They having the ability to pay, there would be no injury to the bank, and consequently no fraud of which it could complain, and the receiver could look to no one else.

If, on the other hand, Gruetter & Joers failed with their case against appellant for damages, it could only be because the court would find that the trade and transfer of the stock was *bona fide*, without collusion, and that appellant had no actual knowledge of the bank's condition, and was possessed of no information showing that there was any ground to apprehend the failure of the bank. By rescission and tendering back the stock and money received, they might have escaped the liability, but by their election to seek compensation in damages at law they voluntarily chose to retain the stock, thereby affirming the validity of the transfer, and placing indisputably the title to the stock and all liability of stock ownership in themselves; and the action of Gruetter & Joers in bringing such suit for damages upon the discovery of the fraud (if any existed) would conclude not only themselves but the receiver as well.

Appellant contends that the receiver could not, by an independent action, brought long after, and during the pendency of the damage suit, undertake to set aside the transfer of the stock as to the bank, on the very ground on which transferees affirmed the validity of the transfer, asserted title in themselves, and sought damages for deceit.

Suppose, for argument, the transaction is fraudulent. Then Gruetter & Joers will recover in their suit. They are then able to pay. Suppose the receiver, in his suit to annul the transfer and recover the assessment of applicant because of transferee's inability to pay, also succeeds. Suppose the judgment of transferees is then collected of appellant for the full value of the stock, the legal title to which is in them. Suppose the receiver collects of appellant the full

amount of the stock assessment, although appellant is not the owner, and the legal title to the stock is in another. Suppose the assets of the bank, considered worthless, subsequently become collectible and pay ont all liabilities, leaving 25 per cent for the stockholders. The title to the stock remains in Gruetter & Joers, and they therefore receive the distributive share as stockholders. The appellant, who has paid the value of the stock to Gruetter & Joers and the stock assessment to the receiver, has lost his right, but retains his liability as a stockholder of the bank, while the rights and advantages to a distributive share going to the stockholders are received by the very parties who have alleged the worthlessness of the stock.

Again, suppose Gruetter & Joers were insolvent at the time of the transfer, but succeeded in their suit, and could then pay the assessment. Would not the receiver be compelled to look to them as the legal owners of the stock? And this would be so, not because they had become able to pay, but simply because they had realized upon one of their assets.

Or again, suppose Gruetter & Joers had loaned money and taken notes therefor, aggregating $18,000, and suits were pending against parties able to pay for the recovery of said amounts, when an assessment was made. Would it have been any reason for bringing suit against appellant because they were forced to sue to reduce their assets to possession, or resort to court to realize them? Or would it do to say that in determining the solvency or insolvency of that firm, these suits should be entirely excluded from consideration?

Suppose Gruetter & Joers had a million dollars in government bonds; that the same had been embezzled by their bookkeeper, and that at the time of the assessment, suit was pending to recover the possession of these securities, under which they were taken into the custody of the law; and that if they failed to succeed in that suit they would have no means of paying the assessment. Would it be fair to refuse to consider the suit as an asset of the firm, or to reject the probable results of it in estimating their financial responsibility?

It seems to me that the suit pending against appellant to recover damages can be considered an asset, and, if so, the transferees are abundantly able to pay. They are not insolvent, and the receiver must look to them. If they succeed in their suit it is because fraud exists. If they fail, it is because of the absence of fraud. And if the transfer was made in good faith, without notice and intent to escape the liability, then the receiver has no cause of complaint, simply because the transferee may be pecuniarily irresponsible.

III.

The complaint of appellant in his fifth, sixth, and seventh assignments of error is to the holding of the court by which he is declared to be personally liable for the assessment, and transferees are absolved therefrom, notwithstanding the validity of such transfer between the parties to it.

The ability of transferees to respond must be determined at the moment of the transfer, not at a subsequent period, under different conditions.

The position of appellee is certainly an anomalous one. At the time of the transfer the bank was still in operation, the transferees were doing a large business, and continued so to do. The assessment was levied by the comptroller in July, 1893, but its call could not affect the solvency and standing of Gruetter & Joers *unless it was enforced* by the comptroller *against their firm*. So that this condition existed: the transfer was made to a firm admitted to be solvent, and which is still solvent, and will continue so to be unless the comptroller enforces the statutory liability against them. If the action is maintainable against appellant, it can only be upon the ground of the insolvency of Gruetter & Joers. Yet if appellant is compelled to pay this assessment, the transferees will remain solvent and able to pay their obligations, and the anomaly of the position is that the receiver maintains his action on the ground of pecuniary irresponsibility on their part, when in fact, by bringing this action against appellant, it leaves transferees solvent and able to meet all their obligations.

In the opinion, the court of appeals says (record, 230):

"The transfer of stock in a failing bank to one who for any reason is unable to respond as promptly and effectually as he was to the liability their ownership imposes, commits a fraud upon the creditors of the bank, renders his transfer voidable at their election, and leaves himself subject to the individual liability imposed by the ownership of the stock, if the creditors elect to pursue him."

Appellant contends that this is not the law; first, the purpose of the parties to the transfer is not taken into consideration. Insolvency of transferee is immaterial if unknown and otherwise transaction is *bona fide*, and, second, the liability of transferrer or transferee to respond is not to be determined by the promptness or the ease with which the assessment may be made from the one or the other. This would give the bank a right to *select* that party who could easiest pay, and then because of such selection, fix and enforce the liability, when by section 5139 of the Revised Statutes it is provided that the transferee "shall succeed to all the rights and liabilities of the former holder." And appellant contends that, inasmuch as transferee, by virtue of this statute, assumes to pay any assessment if made, and inasmuch as this statute is the basis of all liability, it is immaterial whether transferrer is worth many times over the amount transferee is or not, if transferee is at all able to respond. For if he is so able then transferrer is absolved because the "present holder has succeeded to the liability" to answer the assessment.

Appellant insists that the authorities cited by the court of appeals do not support the principle it announces.

In *Germania National Bank vs. Case*, 99 U. S., 628, the facts were that the owner of the stock, the Germania National Bank, transferred it to Wm. A. Waldo, one of the bank's clerks, and it continued to stand in his name. He acquired by the transfer no beneficial interest in the stock, and *there was an understanding between him and the officers of the bank that he should re-transfer it at their request.* And on the examination the cashier of the bank *admitted* that

one reason the transfer was made was to avoid liability as a stockholder. The court in this case says:

"While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania National knew it, and made the transfer to escape responsibility, it establishes much more. The transfer was not an out-and-out transfer. The stock remained the property of the transferrer. Waldo was bound to re-transfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder."

But the court held, and so states the rule to be, that if the transfer was out-and-out, and in good faith, and not colorable only, the transferees were released from liability, although in that case the bank was unquestionably in a failing condition, while in the case at bar it was apparently flourishing, and so considered by all parties; and appellant contends that that principle applied to his case will discharge him.

Peters vs. Bain, 133 U. S., 670, was a suit in equity begun by the receiver of the National Bank of Norfolk to set aside an assignment made by the firm of Bain & Brother for the benefit of creditors, and to subject the assignment property to the payment of debts due the bank, and to charge property in the hands of the assignees with a trust in favor of the bank. It was insisted that the capital stock was a trust fund, of which the directors were the trustees, and that the creditors had a lien upon it in equity, and that this applied as well to the liability upon the stock of the National Bank;

hence no general assignment of property for the payment of debts could lawfully be made by a shareholder. The court says:

"Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with the trust *sub modo* in a sense that neither stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. Richardson vs. Green, 133 U. S., 30–44. Creditors have the same right to look to them as to anyone else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corportion is failing, or manipulate a release therefrom for the purpose of escaping his liability. And the principal is the same where the shares are paid up, and the shareholder is responsible in respect thereof to the equal additional amount. There was, however, no attempt to avoid this liability here."

Consequently whatever the court may have said as to transferring shares was not within the case, and simply dictum.

Boden vs. Johnson, 107 U. S., 251, cited by the court was one of the chief causes relied upon at the bar. The facts were that Johnson owned 130 shares of stock, and transferred them to Mrs. B. Valentine on the books of the bank. Mrs. Valentine was *known* by Johnson at the time to be insolvent. The court, stating the circumstances, divides the case into two branches for its consideration. *First*, whether Johnson had *information as to the condition* of the bank, and, *second*, the *real nature of the transaction* between himself and his transferee. The bank was in a straitened condition; the president was anxious to make a loan on its real estate, and wrote to a former presi-

dent to assist him, who replied that he had a friend (Johnson) who was able to make the loan, and would do so. In November, 1873, Johnson went to Norfolk with Cole, when the president advised him that the need of the loan was urgent, the security was good, and he appealed to him as a stockholder to make the loan. Johnson promised to look into the affairs and make it if possible; $25,000 was the amount asked. Whether Johnson examined the books and papers of the bank or not the president did not remember, but the cashier testified that upon Johnson's visit the book keeper took into the president's room while Johnson was there a statement prepared by him showing the condition of the bank. A few days after his return from Norfolk Johnson wrote to the president, on December 5, 1873, declining to make the loan, and notifying him that he had transferred his stock to Mrs. B. Valentine, enclosed the certificates, with the power of attorney, asked to have the same transferred on the books, and the certificates sent to her at Belleville, Essex county, N. J. There was some correspondence and refusal to transfer the stock, but finally the transfer was made, on the 15th day of January, 1874. On February 14, 1874, the president wrote Johnson that the certificate had not been forwarded to Mrs. Valentine, and enclosed it to him, asking him to hand it to her, telling him again that the affairs of the bank were in a critical condition. Johnson himself did not testify, but Mrs. Valentine testified that her deceased daughter was Johnson's wife; Johnson had no children; her daughter died in 1864; she came from California where she resided in 1865 or 1866, and went to live at Johnson's house in New Jersey; she was divorced from her husband, but he was not dead that

she knew of; Johnson was to pay her $1,000 a year for her services; she preferred the bank stock to money. She said she had been with him some six years; no agreement as to the compensation until 1871. She allowed Johnson fifty cents on the dollar for the stock, as that was the price the president of the bank had offered for it at the time Johnson transferred to her. She does not know who suggested the taking of the stock. The first she knew of it was when he came back from Norfolk and proposed to her to take the stock. She had no property or other means to purchase the stock, except the alleged indebtedness for annual services. She told Johnson that he might consider her jewelry as part of the consideration, but he did not accept it. She had no other bank account, stocks, or bonds, and all the money she had was pocket money.

Under the facts Johnson was held to have had *actual knowledge of the insolvency of the bank*, having been appealed to to tide it over. To *escape the liability* he *transferred to a person known by him to be irresponsible*, at *fifty cents* on the dollar. In that case the court announces this rule:

"Where the transferrer *possessed the information* showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee with the design of substituting the latter in his place, and by thus leaving no one with *any* ability to respond for the individual liability imposed by the statute in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to

show that there was a full or a partial consideration for the transfer as between him and the transferee."

In the case at bar there was no actual notice nor information upon which to ground an apprehension of either failure or assessment. The stock sold at a premium, and *more cash paid to transferees at the time of the transfer than the entire amount of the assessment.*

In the case last above the doctrine is announced that the transferee must not be "one without *any* ability to respond to an assessment." The rule of the court of appeals declares that it is a fraud if transferee is "unable to respond as *promptly* and effectually," as was the transferrer. Appellant insists that it is the ability to respond, and not the promptness of the response, that is the essential point to be determined.

In the case of *Richmond vs. Irons*, 121 U. S., 27–56, cited by counsel at the bar, the facts were that the bank became insolvent and suspended payment September 23, 1873. Holmes, transferee, was president of the bank and an admitted insolvent, and paid for the stock with promissory notes, made payable to his order, but which were of little value. The stock was transferred on the books of the bank, part of it on the day it failed and part the day thereafter. And the court held that in that case it was made *with actual knowledge and in contemplation* of the bank's insolvency.

The doctrine of all the cases is that in order to avoid a transfer in an action brought by the receiver, it must necessarily appear (*a*), that the transfer was not an out-and-out

one, on full consideration and in good faith; or (*b*) *first*, that there was actual knowledge of the bank's insolvency, or information possessed by transferrer showing good ground to apprehend its failure; *second*, combination and collusion with some person to receive the stock known to be financially irresponsible: *third*, a design to escape the stock liability; *fourth*, to cheat the bank out of the collection of its assessment, by leaving the stock in one apparently insolvent and unable to pay, or known to be so. Appellant contends that these essential facts must appear, and that the inability to respond must exist at the moment of the transfer, and not when the assessment is made. The irresponsibility of the transferee, in order to constitute a fraud, must appear at the time of the transfer. For fraud consists not in seeking to escape the liability, but in substituting in the place of the transferrer some one unable to respond, and thus cheating the bank out of its assessment. The fraud consists in the injury to the bank, and it will not do to judge of the motives of the transferrer in the light of what is subsequently known, when in fact transferrer had no knowledge or means of knowledge of those facts.

The transaction in the case at bar differs entirely from any reported case in all its essential features. At the moment of the transfer to Gruetter & Joers they had a stock of furniture estimated by them at $32,000. They received $19,500 cash. They were apparently doing a flourishing business, so that at the moment of the transfer they had in cash and personal property $51,500, with a possible liability by reason of the bank assessment of $15,000. Appellant knew of no other indebtedness, nor did he have reason to

believe that any such existed. The solvency of transferees was apparently beyond dispute. It could not be said that they were irresponsible transferees within the meaning of the above decisions. Not only were they apparently solvent, but they are in fact so, if any regard is given to the action instituted by them against appellant on January 23, 1893, if the allegations upon which said suit is based are true, for if appellant was guilty of fraud they could recover. At the time of the transfer there was no liability on anyone to respond, for no assessment was made until long subsequent thereto. The assets of the bank might have paid out the creditors and depositors in full. In that event no assessment would have been made, and no liability would have arisen against either transferrer or transferees.

Suppose the suit by Gruetter & Joers against appellant had been pushed to trial, and the payment of the judgment enforced prior to July, 1893. Would it be seriously contended for a moment that the transferrer would be liable to the bank, and if so, upon what principle? Suppose the judgment had been actually paid by appellant, and that when the subsequent assessment was made, transferees, for the purpose of escaping their liability, had converted all their property into money and shuffled it out of sight, and refused to pay the assessment. Can it be true that the decision of the court below is correct upon principle, and that the bank has the right to collect the money of the party that can easiest pay it? It is said by the court of appeals record, 233):

"The question was not, therefore, whether the transferees

were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as available as that of the transferrer. If it was not, the creditors were damaged, and the fraud was actionable. The evidence leaves this question without doubt. Stuart was solvent and amply able to pay the $15,000 in full and at once. Gruetter & Joers were solvent before but insolvent and unable to pay the liability after the transfer."

This certainly cannot state the law, for by it the question is whether the individual liability of transferees was as available as that of the transferrer. It is not a question of availability at all. Transferees might, as we have shown, have had their property in cash and shuffled it out of sight, so that in no event would it be available in an action brought by the receiver. Nor is it a question of whether the liability is at all available at the time of the bringing of the suit. The question is, What was the ability of the transferees to respond when the transfer was made?

Suppose in the case at bar that appellant had only been possessed of the bank stock and $19,500. Suppose that Gruetter & Joers had been possessed of large means at the moment of the transfer, but in speculation or loss by fire they had become unable to pay when the assessment was made, so that their individual liability would not be at all available to the receiver. Could the receiver then look to appellant or his equity in the building? Suppose, again, that the transferees had been men of large means at the time of the transfer; that appellant had been without means, except the cash and the bank stock. Suppose the assessments, instead of coming in seven months, had not come for two years, and in the meantime Gruetter & Joers

had become insolvent and worthless, and the appellant had, by inheritance or otherwise, become possessed of large means. The individual liability of Gruetter & Joers would not be at all available to the receiver, but that of the appellant would. Can it be true, as announced by the Circuit Court of Appeals, that the question is not one of solvency or insolvency, but whether the individual liability of the transferees is as available as that of the transferrer? The question is one of availability, expediency, or ease of payment. For if Gruetter & Joers, the transferees, were able at the moment of the transfer, then the transferrer is absolved. To hold that the question is whether the individual liability of transferee is as available as that of the transferrer would give the bank the right of selection, which was never intended by the framers of the act. It would practically compel and require the transferrer to see to it that his transferees' liability not only was, but continued to be, as available in an action brought by the receiver as his own. If a man was worth $100,000, owning shares of stock in a national bank, it would be essential to him to see to it that the man to whom he transferred was not only worth as much, but that his individual liability was as available. Or if the resources of the transferrer were all cash, so that he could immediately pay if an assessment was made, he would be compelled to transfer to somebody with a sufficient amount of cash, of equal availability and readiness to respond. And not only that, but it would practically make of every transferrer a guarantor of that continuing availability. The statute creating the liability intended that it should cease on a *bona fide* transfer of stock. And if the transfer is so made, mere financial in-

ability of transferee does not leave transferrer liable. Stock assessment is an incident of stock ownership, but ability to meet that assessment is not a test of stock title; and whenever between parties the title to the stock has passed from one to the other, for full value, it is conclusively in that other for all purposes as to all the world.

The title having passed to transferees, the stock liability was theirs, and appellant was absolved therefrom. To affirm this cause this court must find that under the circumstances of the stock transfer, it was as to the bank fraudulent and of no effect. To reach this conclusion the court must close its eyes to the situation and conduct of the parties. All the circumstances usually present in a fraudulent transfer are wanting.

Here are the facts. Negotiations to sell the building instituted by transferees, appellant declaring he cannot buy; stock suggested by transferees, appellant declining to part with it; urgent solicitation by transferees, appellant demanding a premium; stock taken at 20 per cent premium by transferees, appellant paying them in addition $19,500 cash; stock entered on the books by transferees, appellant taking title to real estate in his own name; agreement to rent the building by transferees, appellant making ten year lease, $6,000 per year; furniture stock of $32,000 owned by transferees; appellant leaving $2,500 on deposit in the bank until its failure.

Can it be said that from these facts there was any bad faith? There was no collusion, no combination. The transfer was out-and-out. Appellant had no thought or

desire to part with his stock until transferees suggested; no thought of the bank's failure or impending assessment could have been in the minds of either party under these undisputed facts. Everything shows the transfer to have been in the best of faith, and it cannot be annulled by the receiver in this independent action. He must look to Gruetter & Joers for the assessment, and recover from them. They are admittedly liable, and have no defense. Out of the abundant assets in their possession the claim of the bank ought to have been made long ago, and diligence and endeavor would have given the receiver his money from them. In any aspect of the case, the decree below is wrong, and cannot be sustained upon either reason or authority. The cause should be reversed, with instructions to dismiss the bill.

C. C. FLANSBURG,
Counsel for Appellant.

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